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8 UNITED STATES DISTRICT COURT
9 CENTRAL DISTRICT OF CALIFORNIA
10 WESTERN DIVISION

11 JOSEPH CHANDLER DAVALL,

12 Petitioner,

13 v.

14 WARREN MONTGOMERY,

15 Respondent.
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Case No. CV 18-07252-DSF (DFM)

ORDER TO SHOW CAUSE
AND DENIAL OF REQUEST
FOR APPOINTMENT OF
COUNSEL

18 On August 17, 2018, Joseph Chandler Davall (“Petitioner”) filed pro se
19 a Petition for Writ of Habeas Corpus by a Person in State Custody, challenging
20 his convictions and sentence of life without parole for rape of a child under 14,
21 sexual penetration by force, and related charges. See Dkt. 1 (“Petition”).¹

22 **I.**

23 **ORDER TO SHOW CAUSE**

24 The Petition raises five claims: (1) the use of DNA evidence lacked
25 proper foundation and violated Petitioner’s Due Process Clause rights; (2)
26 there was insufficient evidence for his convictions because the DNA evidence

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28 ¹ Citations to the Petition use the CM/ECF pagination.

1 lacked foundation and because the victim's identification of Petitioner
2 occurred under suggestive conditions; (3) cumulative error occurred; (4)
3 Petitioner's trial counsel was ineffective for failing to object to the lack of
4 foundation for the DNA evidence and the suggestive identification; and (5) his
5 appellate counsel was ineffective for failing to raise Petitioner's ineffective
6 assistance of trial counsel claim on direct appeal. See id. at 5-8, 15.²

7 It appears that Grounds Four and Five have not been exhausted in state
8 court. Petitioner concedes that he did not raise Grounds Four or Five on direct
9 appeal to the California Court of Appeal, in a Petition for Review to the
10 California Supreme Court, or in a habeas petition to the California Supreme
11 Court. See id. at 7-8.

12 Under 28 U.S.C. § 2254(b), habeas relief may not be granted unless a
13 petitioner has exhausted the remedies available in state court. Exhaustion
14 requires that the petitioner's contentions were fairly presented to the state
15 courts, see Ybarra v. McDaniel, 656 F.3d 984, 991 (9th Cir. 2011), and
16 disposed of on the merits by the highest court of the state, see Greene v.
17 Lambert, 288 F.3d 1081, 1086 (9th Cir. 2002). Moreover, a claim has not been
18 fairly presented unless the prisoner has described in the state court proceedings
19 both the operative facts and the federal legal theory on which his claim is
20 based. See Duncan v. Henry, 513 U.S. 364, 365-66 (1995) (per curiam); Picard
21 v. Connor, 404 U.S. 270, 275-78 (1971). As a matter of comity, a federal court
22 will not entertain a habeas petition unless the petitioner has exhausted the
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24 ² Petitioner also purports to raise a sixth claim that "[t]he court of appeal
25 ruling was so lacking in justification that there was an error well understood
26 and comprehended in existing law beyond any possibility of fairminded
27 disagreement." Id. at 6. This is not an independent ground for relief; rather,
28 Petitioner merely recites a state prisoner's burden in seeking federal habeas
relief. See Harrington v. Richter, 562 U.S. 86, 103 (2011).

1 available state judicial remedies on every ground presented in it. See Rose v.
2 Lundy, 455 U.S. 509, 518-19 (1982).

3 A federal court may raise a habeas petitioner's failure to exhaust state
4 remedies sua sponte. See Stone v. City and Cty. of San Francisco, 968 F.2d
5 850, 855-56 (9th Cir. 1992) (as amended). Petitioner has the burden of
6 demonstrating he has exhausted available state remedies. See, e.g., Williams v.
7 Craven, 460 F.2d 1253, 1254 (9th Cir. 1972) (per curiam); Rollins v. Superior
8 Court, 706 F. Supp. 2d 1008, 1011 (C.D. Cal. 2010).

9 As previously discussed, Grounds Four and Five of the Petition are
10 unexhausted; Petitioner's inclusion of those claims thus renders the Petition
11 "mixed," containing both exhausted and unexhausted claims. Such petitions
12 must generally be dismissed. See Lundy, 455 U.S. at 522; see also Coleman v.
13 Thompson, 501 U.S. 722, 731 (1991) (explaining that "state prisoner's federal
14 habeas petition should be dismissed if the prisoner has not exhausted available
15 state remedies as to any of his federal claims"); Castille v. Peoples, 489 U.S.
16 346, 349 (1989) (finding that prisoner's "habeas petition should have been
17 dismissed if state remedies had not been exhausted as to any of the federal
18 claims").

19 In certain "limited circumstances," a district court may stay a mixed
20 petition and hold it in abeyance while the petitioner returns to state court to
21 exhaust any unexhausted claims. Rhines v. Weber, 544 U.S. 269, 277 (2005).
22 For a Rhines stay, the petitioner must show (1) good cause for his failure to
23 earlier exhaust the claim in state court, (2) that the unexhausted claim is not
24 "plainly meritless," and (3) that he has not engaged in "abusive litigation
25 tactics or intentional delay." Id. at 277-78.

26 The Supreme Court has not precisely defined what constitutes "good
27 cause" for a Rhines stay. See Blake v. Baker, 745 F.3d 977, 980-81 (9th Cir.
28 2014). The Ninth Circuit has found that "good cause" does not require

1 “extraordinary circumstances.” Dixon v. Baker, 847 F.3d 714, 720 (9th Cir.
2 2017); Jackson v. Roe, 425 F.3d 654, 661-62 (9th Cir. 2005). Rather, “good
3 cause turns on whether the petitioner can set forth a reasonable excuse,
4 supported by sufficient evidence, to justify” the failure to exhaust. Blake, 745
5 F.3d at 982. Although Petitioner requests a stay and abeyance in the event that
6 any of his claims are unexhausted, see Petition at 21, it is unclear from the face
7 of the Petition whether Petitioner can meet the Rhines requirements.

8 II.

9 REQUEST FOR APPOINTMENT OF COUNSEL

10 Petitioner requests appointment of counsel. See Petition at 9, 22. There
11 is no constitutional right to counsel in connection with a habeas petition. See
12 Bonin v. Vasquez, 999 F.2d 425, 429 (9th Cir. 1993). The decision of whether
13 to appoint counsel for Petitioner is within the Court’s discretion. In deciding
14 Petitioner’s request, the Court evaluates both Petitioner’s likelihood of success
15 on the merits and his ability to articulate his claims pro se in light of the
16 complexity of the legal issues involved. See Weygandt v. Look, 718 F.2d 952,
17 954 (9th Cir. 1983).

18 Here, the Court finds that Petitioner has shown the ability to articulate
19 his claims without counsel. Moreover, it does not appear to the Court that any
20 discovery or an evidentiary hearing is likely to be necessary. See Cullen v.
21 Pinholster, 563 U.S. 170, 180-85 (2011); Totten v. Merkle, 137 F.3d 1172,
22 1176 (9th Cir. 1998); see also 28 U.S.C. § 2254(e)(2). If the Court’s analysis
23 changes, the Court may re-evaluate Petitioner’s request.

24 III.

25 CONCLUSION

26 IT THEREFORE IS ORDERED that within 21 days of the date of this
27 Order, Petitioner do one of the following:

- 28 (1) file a formal stay-and-abey motion if he believes he can make the

1 required showings under Rhines;

2 (2) request that the Petition be dismissed without prejudice under
3 Federal Rule of Civil Procedure 41(a)(1), with the understanding that any later
4 petition may be time barred under 28 U.S.C. § 2244(d)(1);

5 (3) request that Grounds Four and Five of the Petition be dismissed
6 and that he be allowed to either proceed on the exhausted claims, or seek a
7 stay of the then fully exhausted Petition under Kelly v. Small, 315 F.3d 1063
8 (9th Cir. 2003) (allowing for stays of fully exhausted federal petitions without
9 showing of good cause), overruling on other grounds recognized by Robbins v.
10 Carey, 481 F.3d 1143, 1149 (9th Cir. 2007), with the understanding that he
11 will be allowed to amend any newly exhausted claims back into the Petition
12 only if the claims are timely or “relate back” to the original exhausted claims,
13 see Mayle v. Felix, 545 U.S. 644, 664 (2005); or

14 (4) show cause in writing why this action should not be dismissed
15 without prejudice for failure to exhaust state remedies.

16 **Petitioner is expressly warned that his failure to timely comply with**
17 **this Order may result in the Petition being dismissed for the reasons stated**
18 **above and for failure to prosecute.**

19 Petitioner is cautioned that under the Antiterrorism and Effective Death
20 Penalty Act of 1996 (“AEDPA”), a one-year limitation period applies to a
21 federal petition for writ of habeas corpus filed by a person in state custody. See
22 28 U.S.C. § 2244(d)(1). The Court makes no representation that the Petition
23 was timely filed under AEDPA or that any amended petition will be.

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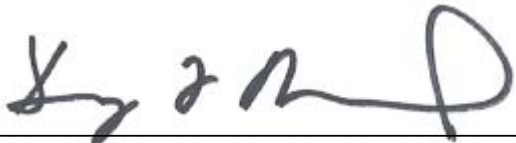
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1 IT IS FURTHER ORDERED that Petitioner's request for appointment
2 of counsel be DENIED.

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4 Dated: November 30, 2018

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7 DOUGLAS F. McCORMICK
8 United States Magistrate Judge
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